**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR**

**::::**

**J U D G M E N T**

**Kailash**
**Vs.**
**State of Rajasthan**

**S.B. CIMINAL APPEAL NO.495/1987**
**UNDER SECTION 374 CR.P.C.**
**AGAINST THE JUDGMENT DATED 20.11.1987**

**DATE OF ORDER :: 08th September, 2006**

**REPORTABLE**

**PRESENT**

**HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ**

Mr.Suresh Kumbhat amicus curiae.
Mr.Rameshwar Dave, Public Prosecutor for respondent.

**BY THE COURT**

This appeal is directed against the judgment dated 20.11.1987 passed by the learned Sessions Judge, Pali whereby he convicted the accused-appellant for offence under Section 376 IPC and sentenced him to undergo rigorous imprisonment of three years with fine of Rs.500/-, in default payment whereof to further undergo one month's simple imprisonment.

The factual matrix of the case are that a first information report was lodged in a Police Station Kerla, District Pali on the basis of parcha bayan of one Dhanna S/o Ganesh Ji by caste Gurjar, resident of Chatra Ki Bhakhari, at 10:15 AM on 20.07.1985 who along with his sister Sua aged 12 years appeared before SHO on 20.07.1985. It was alleged that at 12 in the noon of that day his sister Sua had taken their cattle for grazing towards Kharda Dam. She came back to her house at 4:00 PM. At that time she was crying and her blause was torn apart. On inquiry she told that while she was with the grazing cattle near Kharda Dam, Kailash S/o Narayan by caste Gurjar came there around 1:30 PM, he forcibly caught her and forced her to lie down on the ground. He set upon her body and committed rape upon her. She tried to free herself from the clutches of Kailash but he overpowered her and torn her blause and also rubbed her breast. When Sua raised hue and cry, Teja S/o Sadul by caste Gurjar came there, Kailash run away from there.

On the basis of said parcha bayan a First Information Report for offence under Section 376 IPC was registered and investigation commenced. Challan against the accused-appellant was filed for offence under Sections 376 and 354, 342 and 323 IPC. The prosecution examined as many as nine witnesses in

support of its case. Number of documents were also exhibited by the prosecution. Upon conclusion of the trial, the learned Sessions Judge, Pali convicted the appellant for offence under Section 376 IPC and sentenced him as afore-stated.

I have heard Shri Suresh Kumbhat learned amicus curiae and Shri Rameshwar Dave, learned Public Prosecutor and perused the record.

Learned amicus curiae argued that there was no evidence that rape was committed upon Mst. Sua. Infact Mst. Sua was sister-in-law of the accused-appellant. Her sister Mst. Kali was married to him, whose parents wanted to give her in 'Nata' (second marriage) to someone and were not sending her to appellant. On account of this, the appellant was falsely implicated in the criminal case. He argued that prosecutrix Mst.Sua who has been examined as PW-2, has admitted this fact in her cross-examination that Mst. Kali is daughter of his maternal uncle and Kali's mother had accompanied her to the Police Station when they went to lodge report against the accused-appellant. She also stated that the accused-appellant had snatched her meal in the jungle and on this quarrel had taken place between them. It was a simple incident of manhandling by the accused with the prosecutrix which has been

blown out of the proportion with the sheer purpose of falsely implicating the appellant for offence of rape. The learned amicus curiae has invited my attention to the statement of PW-8 Teja Ram where he states that an alteration has taken place between the appellant and the prosecutrix and he had seen them quarrel with each other and he did not see torn blause of prosecutrix and also did not see the appellant committing rape upon her. Learned amicus curiae has relied upon the report of the Medical Board and also the statement of one of its members, Dr.Labh Chand Joshi, who was posted as Medical Jurist in Bangar Hospital, Pali and was examined as PW-7. With the help of the report of Medical Board Exhibit-P/12 and the statement of PW-7, the learned amicus curiae argued that Medical Board has opined that no sexual intercourse was performed with the prosecutrix inasmuch as there were no injuries on her private parts, thighs, breasts, checks, abdomen or back of body. In the face of this, conviction of the accused-appellant for offence under Section 376 IPC was not sustainable in the eye of law and was liable to be set aside. The learned amicus curiae also argued that mere presence of semen on Dhoti of the accused and Ghaghra of the prosecutrix does not by itself prove commission of rape with the prosecutrix without there being any other corroborating evidence. Conviction of the accused-appellant recorded for offence under Section 376 IPC solely on this basis was bad in

law. He therefore argued that judgment passed by the learned trial court be set aside and accused-appellant be acquitted of all the charges.

On the other hand, learned Public Prosecutor while supporting the judgment passed by the learned trial court argued that there was enough evidence on record to prove the offence under Section 376 IPC against the accused-appellant beyond reasonable doubt. He argued that conviction in a case of rape can be based on the sole statement of the prosecutrix. He invited my attention to the injuries suffered by the prosecutrix from the report of the Medical Board Exhibit-P/12. He argued that opinion of the Medical Board regarding rape not having been committed upon the prosecutrix has rightly been discarded by the learned trial court in the face of overwhelming evidence otherwise available on record which independently proved charge of rape against the accused-appellant. Learned Public Prosecutor also argued that the accused-appellant has not been falsely implicated. Even it there was some matrimonial dispute between accused-appellant and his wife, the evidence against the accused-appellant could not be ignored on that count. He therefore prayed that the appeal preferred by the accused be dismissed and conviction be maintained.

I have given my thoughtful consideration to the arguments advanced by the learned counsel and perused the record.

In this case, the prosecutrix was subjected to medical examination by a Board consisting of three medical men, namely Dr.P.N. Mistry Sr. Specialist Orthopedics as Chairman of the Board, with Dr.P. Garg, Jr. Specialist Gynecologist, and Dr.L.C. Joshi Medical Jurist as members. The Medical Board on examination of the prosecutrix submitted its report which has been proved as Exhibit-P/12. According to this report, following injuries were found on the body of the prosecutrix:-

> "(1) Abrasion 1¾'' liner oblique on upper medial front part left forearm.
> (2) Abrasion linear 1/5'' long on back of right thumb of hand.
> (3) Four linear 1/5'' long abrasion on medial part of right knee.
> (4) Abrasion 1/5'' linear on medial part right knee simple by blunt object of about 48 hours duration."

The Medical Board on further examination of the prosecutrix gave the following opinion:-

> 1. that no sexual intercourse has been performed.
> 2. that in the absence of injuries to her Private Parts, thighs, breasts, cheeks, abdomen and back of body, no definite opinion regarding attempt to perform sexual intercourse can be given.
> (3)A & (3)B that there is no evidence of injury

to back of body, checks, chest & her Private Parts.
(4) that her age is above twelve years & below fourteen years."

In this case, prosecutrix Mst.Sua has been examined as PW-2. Although the police entered her age as 12 years in their statement, but the learned trial court while recording her statement stated that by appearance she was abut 15 years of age. Mst.Sua has stated that the accused manhandled with her and he fell upon her and also committed rape with her, but when he saw Teja coming there, he fled from there. She went back to here home and reported the incident to her brother Dhanna. In her cross-examination, she has admitted that Kali, wife of the accused was her cousin and their family was not prepared to sent Kali to the accused because they wanted to send Kali in 'Nata' marriage to someone else and further that when she went to the police station, mother of Kali was also with her. She has stated that the accused has snatched her meal. She also stated that in the scuffle that ensued she received injuries on her thighs and back. The accused had also bitten and robbed her breasts.

PW-3 Dhanna brother of the prosecutrix, has stated that when prosecutrix came back to their home, she was crying. She told that the accused had manhandled with her (Bathora) and did wrong to her (Khota Kam). In the cross-examination, he has

stated that prosecutrix told him that accused had snatched and eaten her meal and a quarrel took place between them.

PW-8 Teja Ram who was named as an eye witness in the first information report has not supported the prosecution version. He has merely stated that a quarrel had taken place between the accused and the prosecutrix and he had witnessed the incident from a distance of about 15 'Pawdas'. He has denied having gone to the place of the incident and has also denied seeing the accused run away from there. This witness was declared hostile by the prosecution.

Dr.L.C. Joshi who was one of the Members of the Medical Board has been examined as PW-7. He has supported the report of the Medical Board and opinion given therein.

The learned trial court has held that even though the Medical Board and PW-7 have opined regarding rape having not been committed upon the prosecutrix but such opinion was liable to be ignored in the face of direct evidence of rape available on record. According to the learned trial court, the statement of the prosecutrix and other prosecution witnesses could not be over looked simply because the medical evidence did not corroborate them. The presence of semen on 'Dhoti' of the accused and

'Ghaghra' of the prosecutrix, has provided sufficient corroboration to the statements of the prosecutrix and other witnesses. The learned trial court therefore convicted the accused.

According to the report of the State Forensic Science Report Exhibit-17 human semen was detected on the Dhoti of the accused and Ghaghra of the prosecutrix but this shall have to be appreciated in the light of other evidence available on record to come to a finding whether or not rape was actually committed with the prosecutrix. An examination of the report of the Medical Board Exhibit-P/12 would show that while injury No.1 was abrasion 1¾'' liner oblique on upper medial front part left forearm, injury No.2 again was an abrasion linear 1/5'' long on back of right thumb of hand, third injury was four linear 1/5'' long was abrasion on medial part of right knee and fourth injury abrasion 1/5'' linear on medial part of right knee. These injuries were opined to be simple in nature by blunt object of about 48 hours of duration.

Thus as per the report of the Medical Board two of the injuries suffered by the prosecutrix were on the forearm and thumb of her right hand whereas remaining two injuries were on medial part of right knee. PW-7 Dr.L.C. Joshi has deposed that

there was no injury on the outer side of private part of the prosecutrix. The Medical Board in its opinion has recorded that no intercourse has been performed on the prosecutrix. It has further recored that in the absence of injuries on her private parts, no opinion regarding intercourse could be given.

At the same time however vaginal smear of the prosecutrix sent to the State Forensic Science Laboratory did not show presence of human semen as per their report Exhibit-P/17. When 'Dhoti' of the accused and 'Ghaghra' of the prosecutrix upon being subjected to examination proved presence of human semen, there was no reason no human semen would be detected in the vaginal smear if in fact rape had been committed upon the prosecutrix. It need to be noted sample of the vaginal smear was also taken at the same time when 'Dhoti' and 'Ghaghra' were seized and sent for examination by F.S.L. Together.

In the light of evidence available on record it has to be determined whether it was a case of rape or attempted rape. The prosecutrix has although stated that the accused did 'Khota Kam' with her. But this allegation shall have to be scrutinized not only because medical evidence suggested otherwise but also in the light of evidence that the accused had an ongoing matrimonial dispute which the accused had with his wife/in-laws.

This atleast puts the court to caution whether the prosecution witnesses have not exaggerated the allegation a bit. These peculiarities of this case require the court to look out for corroboration to conclude whether offence of rape has been proved against the appellant beyond reasonable doubt. At the same time however it has to be analyzed as to what should the effect of human semen on presence of 'Dhoti' of the accused and 'Ghaghra' of the prosecutrix. In the face of human semen so detected should it be held that the accused made no advances towards the proseuctrix and did not attempt to commit rape upon her.

Injuries on the body of prosecutrix and their dimension and location clearly suggest that the accused attempted to ravish her. Presence of human semen on 'Dhoti' and 'Ghagha' merely proves that the accused had ejaculation at the time of incident. It is however difficult to hold that sexual intercourse was fully performed by the accused with the prosecutrix mainly for three reasons. First is the report of Medical Board which does not suggest of sexual intercourse. Second, complete absence of human semen in the vaginal smear of the prosecutrix. And third, nature, dimension and location of injuries on the body of prosecutrix. Cumulative effect of all these factors coupled with the oral evidence leads to only one conclusion that this in fact

was a case of attempted rape resulting into ejaculation of the accused, then a led of 21 years, giving rise to discharge of semen. This, explains the presence of semen on 'Dhoti' and Ghaghra' and its absence in vaginal smear.

Critical examination of two expert reports -namely report of Medical Board and report of F.S.L. in the light of occulter evidence in this case prove offence of attempted rape against the accused beyond reasonable doubt. Evidence in this case viewed in its totality therefore does not prove offence under Section 376 against the accused appellant beyond reasonable doubt, thus atleast entitling him to benefit of doubt on that count in so far his conviction for that offence is concerned. In the present case, when the accused-appellant was already charged for a grave offence under Section 376 IPC, the charge against him can on the basis of the analysis of the entire evidence can safely be altered into one for offence under Section 376/511 IPC and the appellant can be accordingly convicted.

I may in this connection refer to the judgment of the Hon'ble Supreme Court in Hasanbhai Valibhai Qureshi Vs. State of Gujarat & Ors., reported in 2004 (5) SCC 347 in which the Court while reiterating the law enunciated in Kanti Lal Chandulal Mehta Vs. State of Maharashtra (1969 (3) SCC 166)" that law

gives ample powers to the courts to alter or amend a charge whether by the trial court or by the appellate court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about the charge or not give him full opportunity of meeting it or putting forward any defence open to him on the charge finally preferred against him."

In the result, the appeal is partly allowed. Conviction of the accused appellant for offence under Section 376 IPC is set aside but at the same time he is convicted for offence under Section 376/511. Since the accused appellant was sentenced to undergo rigorous imprisonment of three years and fine of Rs.5000/-, the sentence so awarded is reduced to half in that the accused-appellant shall undergo rigorous imprisonment for 18 months and shall pay fine of Rs.250/-. In default of payment, he shall be required to undergo further simple imprisonment of 15 days.

**[MOHAMMAD RAFIQ],J.**

Ashwini/-